

**ICSID CASE NO. ARB/X/X
VANGUARD INTERNATIONAL**

v.

THE GOVERNMENT OF THE REPUBLIC OF CALPURNIA

**MEMORIAL FOR RESPONDENT
REPUBLIC OF CALPURNIA**

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STATEMENT OF FACTS

1. In early 2007, the State Fund for Commerce and Development in Calpurnia (SFCDC) and other Calpurnian Shareholders together with Vanguard International, a company headquartered in Nova Parigi, Gaul, participated in the establishment of a joint venture company under the name of 'VanCal'. This company was dedicated to providing GSM/UMTS (3GPP) units in Calpurnia.

2. The SFCDC is a private corporation owned by the Calpurnian State and holds 30% of VanCal Stock. Although shareholder composition varied throughout VanCal's existence, in the years ending December 2004 and December 2005 it was set at 41% for Calpurnian firms, banks and companies (including SFCDC); 30% for foreign shareholders and 29% for natural persons, including farmers and workers.

3. The Calpurnian government held routine police searches during 2003 and 2004, and during that time the homes of Ms. Pescara and Mr. Kolowenko, VanCal's chief technical officer, were inspected on suspicion of unlawful data collection and espionage activity. Consequent press releases explained to the public the nature of these inspections.

4. In late 2004, VanCal underwent some changes: the October 14th shareholder meeting elected SFCDC representatives Dr. Swift and Mr. Shelly. Meanwhile, on November 15th, the board accepted Ms. Francesca Pescara's resignation as managing director "after thanking her for her efforts during several years in office", and subsequently named Mr. Korchnoi to fill this position.

5. At February 17th, 2005 there was a meeting to discuss a proposal from board chairman, Dr. Jonathan Swift, which sought that "the minimum amount of the legal dividend be paid to the shareholders and the balance be appropriated for the purpose of creating a reserve fund for severance pay for the company's workers".

6. The previous concept was followed through on the March 10th board meeting in which some members expressed their opinion that the minimum dividend should be divided among the shareholders; that the balance of the profit be credited to the company's reserve fund and that no stock dividend be issued. Additional agreements included the decision to divide a reasonable percentage of the company's profits in the form of cash or stock dividend in order to "preserve the rights of Calpurnian shareholders". Also, the board noted that "due to the existing dispute

between the governments of Calpurnia and Gaul, the payment of profits to foreign shareholders has been suspended for the time being”.

7. On May 21st Vanguard International officials wrote to Mr. Korchnoi requesting that the amount of dividends payable be placed in a separate bank account to be opened under Vanguard International’s name. Mr. Korchnoi replied on the 27th that no further payments could be made to foreign shareholders. Nevertheless, in 2006 and 2007, VanCal declared stock dividends, distributing them to all shareholders, just as it had done in 2004 and 2005.

8. On November 2005, Ms. Pescara, a board member representing Vanguard International and former managing director of VanCal, ceased her functions. No new replacement was named in this position. SFCDC chairmen Mr. Poe and Mr. Korchnoi also resigned during this meeting and are replaced by two directors representing the SFCDC, both of whom were elected by unanimity.

9. On June 14 2006 the Commercial Court of San Inocente de Irkoutsk dismissed requests by Ms. Pescara to order VanCal to transfer to her account in Gaul, dividends on 1% shareholding, stating that “Ms. Pescara as a mere nominee, has no beneficial interest in the shareholding and therefore lacks standing to bring this action”

10. On September 28th 2006 the VanCal board notifies Vanguard International via email that the dividends had been “credited on VanCal’s books to Vanguard’s account”

11. October 23 2006- Vanguard International decided to remove its members from the VanCal board and refused to replace them, stating that it “no longer sees a reason to continue its presence at board of director and shareholder meetings of VanCal.” On November 11th Dr. Swift sent an email to Vanguard International officials suggesting that the resignation be withdrawn and new directors designated.

12. On February 5th 2007 Vanguard International officials communicated with Mr. Poe, the SFCDC chairman, claiming de facto expropriation by Calpurnian state entities- in violation of its international obligations- and demanding compensation, as well as a demand that Mr. Poe transmit this to his superiors, including the appropriate ministers. Correspondingly, Mr. Poe replied on the 21st that the Government declined to get involved in “what is merely an internal shareholder dispute” and stated that the Government has no authority in any event.

13. On July 31st 2007 Vanguard International requested institution of arbitration proceedings in accordance with ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

ARGUMENTS

I. THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES DOES NOT HAVE JURISDICTION OVER THE PRESENT DISPUTE.

1. Jurisdiction requirements for the International Centre for Settlement of Investment Disputes (hereinafter “the Centre” or “ICSID”) are those established in article 25 of the ICSID Convention.

A. The requirements of article 25 of the ICSID Convention have not been met.

2. Jurisdiction requirements of article 25 have not been met because (1) the acts which are attributable to the state do not arise out of an investment; (2) the acts which do arise out of an investment are not attributable to the State; and (3) party consent has not been established.

1. *The centre lacks jurisdiction ratione materiae.*

3. For the centre to have jurisdiction, the legal dispute must have “arisen directly out of an investment”¹. Article 1 (1) of the Gaul-Calpurnia defines investment as “every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter contracting party”. Claimant’s investment in the republic of Calpurnia is essentially its 31% share in VanCal stock. Damages which allegedly have occurred to such investments are not attributable to the state of Calpurnia but rather to a private entity. Acts such as the police searches and the issuance of business visa’s in theory are attributable to the state, but these have not resulted in a palpable economic damage to the investor and therefore lack the *ratione materiae* requisite necessary for the Centre’s jurisdiction.

2. *The Centre lacks jurisdiction ratione personae.*

a. *Acts of a private nature are not attributable to the State.*

4. State ownership does not *per se* qualify the company’s actions as attributable to the state, in the *CSOB* case; the tribunal deemed that more than state ownership, what is determinative is the nature of the company’s acts.² Article 25 of the ICSID Convention requires disputes to be

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, article 25.

² See: *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), decision on Objections to Jurisdiction of May 24, 1999, 14 ICSID Rev.—FILJ 251 (1999);

between an investor and a State for the centre to have jurisdiction *ratione personae*. The fact that VanCal is controlled by the State-owned State Fund for Commerce and Development in Calpurnia (hereinafter “SFCDC”) does not necessarily qualify the dispute under this criterion.

5. The SFCDC does not exercise state authority or perform governmental functions. Claimant’s dispute arises from dissatisfaction with the management of VanCal, which in spite of state ownership continues to be a private entity. The SFCDC’s acts as a mere shareholder in VanCal are considered as those of a private corporation under Calpurnian law³, it is a recognized general principle of international law that the conduct of private persons or entities is not attributable to the State⁴.

b. SFCDC does not pass the functional or the structural test in order for its actions to be attributable to the State.

6. ISDS tribunals have developed “structural” and “functional” tests to determine “whether actions of an entity other than Government itself may nevertheless be attributable to the *State*”⁵. The “structural test” refers to aspects such as the legal personality, ownership and control⁶, the “functional test” includes aspects such as the character, purposes and functions performed by the entity whose actions are under scrutiny⁷. The SFCDC’s legal personality within VanCal is that of a private corporation, and therefore it does not pass the “structural test”.

7. Furthermore, because the SFCDC actions within VanCal are those of a regular shareholder, it does not fulfill the “functional test”. In the *Maffezini* case the tribunal held that in light of the functional test, “Commercial acts cannot be attributed to the State, while governmental acts should be so attributed”⁸. Shareholder issues are considered of commercial under Calpurnian law, proven by the fact that the dispute was taken to the Commercial courts of Calpurnia.

³ See Abstract from Respondent’s Reply to Request for Arbitration, ¶ 11.

⁴ Commentary on articles of state responsibility for internationally wrongful acts. P. 18

⁵ UNCTAD: Investor–state dispute settlement and impact on investment rulemaking, New York and Geneva, UN (2007) p.28; Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7), decision on Objections to Jurisdiction of January 25, 2000, ¶ 77-80.

⁶ Ibid.

⁷ Ibid.

⁸ Maffezini, Supra note 5. ¶ 52.

Statements such as the one made by Dr. Swift that “the main objective [of the company] is... to protect the interests of the country as to preserve the industry and interests of all shareholders including minor ones (...)” cannot be interpreted as an interference of Government policies in the company and constitute an isolated incident. Therefore, the inability to comply with the functional and structural criteria exempts the SFCDC’s actions from being attributable to the State, thus denying a basic element in establishing the Centre’s jurisdiction according to article 25 (1) of the ICSID convention.

3. Party consent has not been given because provisions in the Gaul Calpurnia BIT have not been met, and the Calpurnia Flatland BIT is not applicable.

8. In order to for the Centre to have jurisdiction, party consent is necessary⁹. Consent must be given in written form, and this can be given in a treaty, a contract or local law¹⁰. In this case, Claimant’s claim to party consent is based on the bilateral investment treaties between Calpurnia and Gaul and between Calpurnia and Flatland, neither of which is applicable to this dispute.

a. The Gaul-Calpurnia BIT is not applicable.

9. The provisions of the Gaul-Calpurnia BIT cannot be applied because (a) Claimant has not pursued amicable settlement for the 18 months as required by Article 11(2) of the Gaul-Calpurnia BIT, and (b) Claimant has pursued its claims before the domestic courts of Calpurnia, therefore in accordance to article 11(3) of the Gaul-Calpurnia BIT it may no longer select an arbitral remedy.

b. The Calpurnia-Flatland BIT is not applicable.

10. Article 4 of the Gaul-Calpurnia BIT does not extend to dispute resolution mechanisms such as the one referred to in article 7 of the Calpurnia-Flatland BIT. Moreover, Article 7 of Calpurnia-Flatland BIT cannot be applied because the state has not been a contracting state of the abovementioned treaty for the time period from December 2003 to July 2007 relevant to the dispute.

i. Flatland is not a member of the International Centre for the Settlement of Investment Disputes (ICSID).

⁹ ICSID Convention, article 25, supra note 1.

¹⁰ Garcia-Bolivar, Omar E. Special Report on ICSID Jurisdiction <http://www.bg-consulting.com/docs/report_icsid_jurisdiction.pdf>.

11. Article 70 (1) of the Vienna Convention on the Law of Treaties, of which both states are parties to¹¹, states that the termination of a treaty releases the parties from any obligation to further perform the treaty. Furthermore, article 71 of the ICSID convention stipulates that the denunciation of the convention will take effect six months after the receipt of such notice. Because the Government of Flatland denounced the ICSID convention on May 2nd 2003 and the alleged dispute arose until December 8th 2003, Claimant cannot use the Calpurnia-Flatland BIT as an instrument to establish the Centre's jurisdiction.

ii. Even if the most favored nation principle was applicable, it cannot extend to dispute resolution mechanisms.

12. The Most Favoured Nation Principle (hereinafter "MFN"), is established in article 4(1) of the Gaul-Calpurnia BIT:

"Investments made by investors of one Contracting Party in the territory of the other Contracting Party, or to returns related thereto, shall be accorded treatment which is not less favourable than the host Contracting Party accords to the investments and returns made by its own investors or by investors of a third state, whichever is the most favorable to the investor."

13. Even though in the *Maffezini* case the tribunal allowed the importation of the Chile-Spain BIT in order to establish jurisdiction¹², it is important to note that the MFN clause relevant to that case was much broader than article 4(1) of the Gaul-Calpurnia BIT since it established that the MFN principle was applicable "in all matters subject to this Agreement"¹³, whereas the applicable treaty limits application to "investments made by investors" and "returns related thereto". More recently in cases such as *Salini v. Jordan*, arbitral tribunals have limited the ability to evoke MFN clauses in order to establish jurisdiction, citing that

¹¹ See Second Clarifications, ¶ 32.

¹² *Maffezini v. Spain*, supra note 5.

¹³ Article IV Argentina – Spain BIT

“the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement.”¹⁴

14. Furthermore, in *Plama v. Bulgaria*, the tribunal concluded that an MFN provision cannot be induced to establish jurisdiction

“[...] unless the MFN provision in the basic treaty leaves no doubt that the contracting parties intended to incorporate them”¹⁵

15. The MFN principle cannot be extended to dispute resolution in the following cases: (1) if the party has conditioned its consent to the exhaustion of local remedies, (2) if the parties have agreed to a dispute settlement arrangement which includes a “fork in the road provision”, this being a choice between submission to international arbitration or domestic courts; and (3) if the agreement established a determined body to settle the arbitration¹⁶. Article 11(3) of the Gaul-Calpurnia BIT establishes a fork in the road provision, thus because Claimant pursued a settlement of the conflict before the Commercial Court of San Inocente de Irkoutks, a Calpurnian court, it can no longer pursue an arbitral remedy.

16. Therefore, because the MFN principle cannot be applied neither to dispute resolution mechanisms, nor cases where a fork in the road provision is established and because Flatland has not been a Contracting State at the times relevant for the jurisdiction of this arbitral tribunal, the Calpurnia-Flatland BIT is not evocable and jurisdiction cannot be established through its provisions.

¹⁴ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), ¶ 118.

¹⁵ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Decision on Jurisdiction of February 8, 2005, 20 ICSID Rev.—FILJ 262 (2005); 44 ILM 721 (2005), ¶ 223.

¹⁶ *Maffezini v. Spain*, supra note 5. ¶ 63.

II. RESPONDENT DID NOT FAIL IN PROVIDING FAIR AND EQUITABLE TREATMENT TO VANGUARD INTERNATIONAL.

17. Article 2 of the Gaul-Calpurnia BIT, establishes the basic standards of the fair and equitable treatment, a recognized principle in international law.¹⁷ Respondent has not violated any of the stated principles for it has maintained favorable conditions for the investment.

A. The cessation of translation of corporate reports and notices into Gaulois does not constitute discrimination against Vanguard.

18. Discriminating, in international investment law, is the action that violates the principle of national treatment against a foreign investor¹⁸. National treatment is defined as the principle where the host country must extend to foreign investors a treatment that is no less favorable as the treatment that it provides to national investors in like circumstances¹⁹. Regarding the dissemination of corporate reports and notices, all shareholders were treated alike, and Vanguard International was not entitled to receive any special privileges in this regard.

19. Calpurnian legislation is silent on the right of the shareholders to translations into other languages. It only requires that if the originals are not in Calpurnian, certified translations into Calpurnian be provided.²⁰

20. Claimant cannot consider as discriminatory the fact that the translation of some material into Gaulois was ceased. This action was not oriented to create less favorable conditions to Vanguard representatives. Moreover, the Claimant does not validly argue that there is a subjective element motivating the claimed discrimination. There was no agreement between parties which obliged the SFCDC to translate any kind of material. Distributing material in a language different from Gaulois, has not resulted in any palpable damage.

¹⁷ Organization for Economic Cooperation and Development, Fair and Equitable Treatment Standard in International Investment Law (2004), p. 2.

¹⁸ UNCTAD: National Treatment, New York and Geneva, UN (1999) p.1

¹⁹ Ibid.

²⁰ See first clarifications, ¶22.

B. The proxies held by the Vanguard representative were correctly ruled unacceptable for the 16 November 2005 meeting.

21. Calpurnian law requires that a proxy precisely state the full names of the shareholder, the proxy-holder, and the event for which it is issued²¹. Regarding the proxies held by Mr. Rindler, they were found not to be valid for the 16 November 2005 meeting for entirely justified reasons. The proxies were not properly certified, and had been given only for a 11 October 2005 meeting.²²

22. Rejection of these proxies does not represent discrimination, and did not intend to interfere with the participation of Vanguard representatives in the board. They were correctly rejected due to formal irregularities. It was Vanguard's responsibility to provide their representatives with valid and acceptable legal documents to assure their participation in the meetings. The decisions made in this meeting were properly discussed and all formal requirements to adopt a decision on the Board of Directors were complied with.²³

C. The email sent by Mr. Korchnoi to Claimant does not represent discrimination.

23. The email sent by Mr. Korchnoi to Vanguard International, on 27 May 2005, stating that no further payments could be made to foreign shareholders, was unauthorized and had been superseded by statements by VanCal of its willingness to make any license fee and dividend payments it owed. SFCDC is not responsible for the reckless announcement that Mr. Korchnoi decided to distribute. The Board of Directors did not directly communicate any decision on this matter.

D. In any event, the acts performed by SFCDC are not attributable to the State of Calpurnia.

24. In the event that actions taken by the VanCal board were deemed to be discriminatory, the actions conducted by the SFCDC as a private shareholder cannot be attributed to Respondent.

²¹ See second clarifications, ¶ 20.

²² See abstract from Respondent's Reply to Request for Arbitration.

²³ See first clarifications, ¶ 3.

25. In compliance with article 4 of the ILC's Articles on Responsibility of States for International Wrongful Acts, a conduct of a State organ can be in international law attributed to that State if this entity exercises public authority.²⁴

26. In this case, since the SFCDC is not exercising any kind of public authority it is not constituted as an organ of the State of Calpurnia; therefore, its conduct cannot be attributed to the latter. The SFCDC was acting together with Vanguard International in a typical private corporation, in the form of a joint venture.

27. The SFCDC had the same scope of action and duties than those of Vanguard International. There is no evidence to establish that SFCDC constitutes an organ of the Calpurnian Government. Therefore, the SFCDC's conduct is not attributable to the Republic of Calpurnia.

28. Although article 8 of the articles on Responsibility of States for internationally wrongful acts establishes the Responsibility of States for acts of entities which are not “official” State entities or organs, in the case, it is possible to see, given the factual relationship²⁵ between the Government of Calpurnia and SFCDC itself, that there is no official or non official relationship to be extracted in an objective way from the case. Claimant failed to provide with an actual rightful fact or condition to determine so.

29. Tribunals have often applied a functional test in order to establish whether the actions of a company respond to governmental matters or are fundamentally private and commercial; and hence attributable to State or not. In the *Maffezini v. Spain* case, the award established:

“the Tribunal must establish whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial. Commercial acts cannot be attributed to the Spanish State, while governmental acts should be so attributed²⁶.”

30. The application of this test, and the analysis of all the actions performed by SFCDC, clearly determines the impossibility to attribute all the actions alleged by the claimant, to the

²⁴ Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83. U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83

²⁵ Ibid. note 8

²⁶ *Maffezini v. Spain*, supra note 5, ¶52

State of Calpurnia. The decisions and acts taken by the SFCDC representatives cannot be attributed to the Government of Calpurnia in any legal or factual data implied from the case.

31. In the *Barcelona Traction*²⁷ case, the International Court of Justice stated that customary international law recognizes the separateness of corporate entities. The conduct of a State-owned private company not acting with delegated public law authority, presumptively is private conduct²⁸.

32. In *Tradex v. Albania*²⁹, the Tribunal accepted that no matter how the Respondent felt, or if it considered to be acting accordingly to its State policies, there is no room for subjective elements when determining whether the actions can be attributable or not to the State. If there is no truth obtainable from the facts, their actions cannot be attributed to their State.

33. In the present case as well, no subjective discernment or thought carried by SFCDC's personnel can be simply automatically equated as a manifestation of the Calpurnian Government. Moreover, it is implausible to create a link between SFCDC's actions and those of Government of Calpurnia based solely on the Claimant's perception that such actions responded to the implementation of government policies.

34. Even though SFCDC is owned by the State of Calpurnia, it was behaving as a private organ. Consequently, since SFCDC's acts are commercial, they are attributable only to the individuals that made the decisions and to the company itself, but not in any way to the State of Calpurnia.

E. Respondent has not failed to full protection and security to Claimant's investment.

35. Article 2 of the Gaul-Calpurnia Bilateral Investment Treaty states the basis for the protection of the investment. Respondent's actions have not interfered with Claimant's property rights to be responsible under international law. ISDS jurisprudence has indicated that the full protection and security standard encompasses damages or losses sustained by an investor sustained by an investor as a result of violent episodes resulting directly from government acts or

²⁷ Weiler, Tod. *International Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May (2005). p. 46

²⁸ *Ibid.* p. 29

²⁹ See generally *Tradex v. Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999

due to a lack of adequate protection of the investment by government officials or police³⁰. The actions which the Claimant sustains have violated the full protection and security to its investment have not resulted in a significant economic loss.

36. The American Law Institute's Restatement (Third) of Foreign Relations Law of the United States states that "... a state is not responsible for loss of property or other economic disadvantage resulting from [any action] ... that is commonly accepted within the police powers of the states if it is not discriminatory"³¹

37. The Calpurnian Government has not failed to provide the Claimant's investment with full protection and security, the police searches in the homes of Ms. Pescara and Mr. Kolowenko were a legitimate exercise of a State's sovereign right to protect its national security. The protests outside of Ms. Pescara's home though unfortunate cannot be blamed on the State, and moreover resulted in no clear economic damage.

III. RESPONDENT HAS NOT EXPROPRIATED CLAIMANT'S INVESTMENT.

A. Respondent has not deprived Claimant of its property rights.

1. Claimant's investment did not suffer from indirect expropriation on behalf of the Respondent.

38. Indirect or creeping expropriation is known as a state's action which seeks "...[t]o achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned."³²

39. In any case, it is very difficult to ascertain that a company has suffered from expropriation. Of the seven decisions rendered in 2006 that examined claims based on expropriation, only one decided in favor of the investor while six rejected such claims.³³ The difficulty of determining whether expropriation has occurred in cases of creeping expropriation is resolved by looking at criteria which aid in concluding if acts enacted by the government are

³⁰ UNCTAD, supra note 5, p. 46.

³¹ Restatement of the Law Third, the Foreign Relations of the United States, American Law Institute, Volume 1, 1987, section 712, Comment g.

³² Ibid.

³³ UNCTAD: Latest Developments in Investor-State Dispute Settlement. IIA MONITOR No. 4 (2006) International Investment Agreements. (New York and Geneva, UN, 2006) p. 5.

tantamount to expropriation. (a) Loss of managerial participation in the property and (b) the severity of the economic impact, are recognized as litmus tests in order to determine such existence.³⁴

a. Claimant has not lost managerial participation in the property.

40. In *Foremost Tehran Inc. v. Iran*, the Tribunal dismissed the expropriation claim stating that even though the departure of the company's personnel from Iran contributed to the diminution of the enjoyment of Foremost's rights, it did not affect their fundamental nature. This derives from the fact that the Claimant failed to provide the existence of any statutory restriction on its right to sell or otherwise dispose of its shares.³⁵ In the present case, Claimant has maintained control of its 31% at all times. It has never lost its right to sell or dispose of it.

41. In addition to this, Vanguard International claims that in November 2005, Respondent incurred in the blockage of two proxies that were intended to name a replacement in the board of directors. It is important to note that the form of proxy held by Mr. Rindler was correctly ruled unacceptable for the shareholders' meeting of 16 November 2005 as it had not been properly certified and had been given only in relation to a meeting scheduled for 11 October 2005. Consequently, Claimant's allegations must be clearly ruled out as misleading.

42. Claimant's participation on the Board ended only when it withdrew its representatives by email on 23 October 2006 and it declined to replace them. Respondent even urged Vanguard International to replace them. In an email from VanCal's Jonathan Swift to Claimant he suggested that the resignation be withdrawn and new directors be designated. It is clear that Respondent interfered in no way in the Claimant's right to manage its participation in the company.

³⁴ "Indirect Expropriation" and the "Right to regulate" in International Investment Law, OECD Directorate for Financial and Enterprise Affairs, Working Paper for International Investment (2004), p. 10.

³⁵ *Foremost Tehran Inc. v. the Government of the Islamic Republic of Iran*, (1986) I.U.S.C.T.R. 228. See also: Christie, *What Constitutes a Taking of Property Under International Law?*, 38 *Brit. Y.B. Int'l L.* 307, 333-34 (1962); *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15 Award, 13 September 2006.

b. None of Respondent's actions caused a severe economic impact on Claimant's property.

43. In *S.D. Myers, Inc. v. Canada*, the Tribunal dismissed the company's claim of indirect expropriation, stating, among other things, that an expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights.³⁶ Furthermore, the Tribunal in *Tecmed v. The United Mexican States* required a finding that would show that due to the actions of Respondent, the assets involved had lost their value or economic use for Claimants and the extent of this loss.³⁷ In the present case, Claimant still possesses its 31% stake in the company, it still has management capacity, and the 31% has not suffered any actions that would have been detrimental to its value. Therefore, it has not lost its worth nor its economic use.

44. Also, regarding the email sent by Mr. Korchnoi on 27 May 2005, stating that no further payments could be made to foreign shareholders, it was unauthorized and was superseded by statements by VanCal expressing its willingness to make any license fees and dividend payments it owed. In addition to this, VanCal declared stock dividends in 2004, 2005, 2006 and 2007, which were distributed to all shareholders, including Claimant. Furthermore, all shareholders were treated alike in the dissemination of corporate reports and notices. Information was being made available to Claimant as late as September 2006.

2. Acts enacted by SFCDC directors which deprive Claimant from its investment are not attributable to the State of Calpurnia.

45. International law recognizes that: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the

³⁶ *S.D. Myers, Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000. See also: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006

³⁷ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/02 Award (29 May 2003). See also: *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, Decision on Liability, 3 October 2006; *Pope and Talbot, Inc. v. Canada*, Interim Award, (2000)

conduct.”³⁸ In the present case, the actions taken by SFCDC directors were not carried out by instructions or the direction of the Government of the State of Calpurnia in any way.

46. First of all, it was later clarified that the email, stating that no further payments could be made to foreign shareholders, sent from Mr. Korchnoi to the Claimant on 27 May 2005, was unauthorized and was later followed by statements expressing VanCal’s willingness to make any license fee and dividend payments it owed. This only comes to show how the directors acted by their own will.

47. Second, it is not the State’s place to be involved in a matter which is a company’s internal dispute. On 5 February 2007, Claimant wrote a letter to Mr. Poe (chair of SFCDC) demanding to include the appropriate Ministers in the matter. Mr. Poe answered by declining to involve the Government in what is merely an internal shareholder dispute and by stating that the Government has no authority in any event.

48. From all of the facts we may conclude that the actions taken by SFCDC directors are imputable to them and to them only. They were never influenced by any directives or orders emanating from the Government of the State of Calpurnia.

³⁸ Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83, article 8.

PRAYER FOR RELIEF

Respondent asks the Tribunal to adjudge and declare that:

- I. The International Centre for the Settlement of Investment Disputes lacks jurisdiction over the present dispute.**
- II. The Republic of Calpurnia has not failed in providing fair and equitable treatment to Vanguard International.**
- III. Respondent has not expropriated Claimant's investment.**

Republic of Calpurnia